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No. 82-485

IN THE

Supreme Court of the United States

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., Larry C. Flynt, LFP, Inc., and L.F.P., Inc.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1) Does the Due Process Clause permit New Hampshire to assert jurisdiction over a suit brought by a New York plaintiff against an Ohio publisher arising out of the defendant's publishing activities in Ohio simply because a small quantity of the defendant's magazines were sent into New Hampshire by an independent distributor and because the plaintiff hypothesizes some remote and speculative harm that might have occurred within New Hampshire?

2) Do the First Amendment and the Commerce Clause allow New Hampshire to penalize a magazine publisher for the fact that some of its magazines were sent into the state by an independent distributor by compelling it to defend litigation concededly centered around injury not suffered in New Hampshire and barred by the statute of limitations of every other state?

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OCTOBER TERM, 1982

KATHY KEETON,

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 11a-20a) is reported at 682 F.2d 33. The opinion of the District Court (Pet. 2a-8a) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on June 16, 1982. The petition for a writ of certiorari was filed on September 14, 1982, and was granted on January 24, 1983. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and Section 1 of the Fourteenth Amendment (Pet. 21a) and a portion of the New York long-arm statute (Pet. 22a) are set out in the appendix to the petition for certiorari.

Constitution of the United States

Article I, Section 8

The Congress shall have power . . . to regulate commerce . . . among the several states.

New York CPLR § 301
Jurisdiction over persons, property, or status.

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

STATEMENT OF THE CASE

The present action was commenced in federal district court in New Hampshire in October, 1980, over four years after the cause of action accrued, after having already been dismissed once by an Ohio court on statute of limitations grounds. The subject matter of the suit concerned a cartoon and a pictorial centerfold published by Hustler magazine. The plaintiff, Kathy Keeton, is also a publisher of "sophisticated gentlemen's literature" and is the common law wife of Bob Guccione, publisher of Penthouse magazine. New Hampshire was chosen as a forum because it was the only state where the statute of limitations remained open.

The plaintiff has at all relevant times resided and worked in New York. (53a) Hustler magazine is an Ohio corporation, since moved to California. (41a) Hustler's parent corporation, L.F.P., Inc., an Ohio corporation with no editorial control over the contents of Hustler, presently has its principal place of business in California. (36a) Larry Flynt, the publisher of Hustler, has resided and worked in Ohio and California. (39a) The decision to print and the printing of the complained-of material occurred in New York and Ohio. (41a, 45a)

The defendants neither own nor rent property in New Hampshire, and neither solicited nor received advertising revenues from within the state. They are listed in no telephone directory there, employ no salesmen there, are not licensed to do business there, and maintain no bank accounts there. (37a, 40a, 42a, 44a) Hustler magazine's sole contact with New Hampshire was that some unascertained number of Hustler magazines, known to be less than one per cent of its total circulation, was sent into the state by independent distributors.[1] The plaintiff's

[1] The gross revenues of the issues in question constituted less than 1% of Hustler's sales in the United States. (43a) The comparative ranking with other magazines circulated in the state is not known.
(footnote continued on following page)

sole contact was harm to a hypothesized local reputation, said to exist by virtue of the fact that plaintiff's name appeared in fine print on the masthead page of three magazines that enjoyed some local circulation, along with the names of all other publishers and officers. (50a, 51a)

The district court found that the plaintiff's allegation of contact was "strained at best", noted that she had the burden of pleading and proving such facts, and concluded that she had shown "absolutely no connection with the state of New Hampshire." (Pet. 7a). Having thus rejected these implausible and unsupported allegations of harm as too "tenuous and generalized", (Pet. 7a) the court concluded that New Hampshire had no interest in the case because the relationship between the state, the parties, and the events was too attenuated.

The Court of Appeals agreed that due process prevented assertion of jurisdiction where the litigation was centered around damage to the plaintiff's reputation elsewhere. (Pet. 18a) It held that Hustler lacked sufficiently systematic contacts to support general jurisdiction over causes of action not related to any New Hampshire activity. While recognizing that in some situations an out-of-state plaintiff might have a local reputation sufficient to support jurisdiction, it found New Hampshire to have insufficient interest on these facts to tip the due process balance. (Pet. 19a)

(footnote continued from preceding page)
(76a). Furthermore, it is not known how many magazines were sold in New Hampshire; the only figures reflect sales to wholesalers who distribute *some portion of their magazines* in New Hampshire. (74a). The number sold in the state is obviously smaller. During the time period in question, Hustler magazine did not distribute to New Hampshire wholesalers directly, but through an independent distributor in Derby, Connecticut. (78a).

SUMMARY OF ARGUMENT

The Due Process minimum contacts standard for assertion of personal jurisdiction requires that the burden to the defendant be outweighed by the state's interest in litigating the dispute, the interstate judicial system's interest in efficient dispute resolution, and the plaintiff's interest in obtaining convenient relief. For the plaintiff to choose a state simply because the statute of limitations has run elsewhere frustrates convenient and efficient dispute resolution and affronts the sovereignty of other members of the interstate judicial system.

In addition, the burden on the defendant is unusually high because activities engaged in elsewhere and the alleged injuries suffered elsewhere must be litigated in an inconvenient location and be subjected to local rules such as statutes of limitations. The countervailing interest of the forum is likewise reduced where the hypothesized injury within the state is so remote and speculative, and of such vanishing importance to the litigation, that it constitutes only a pretext for bringing the defendant within the jurisdiction of the state. Since the interest in convenient and effective dispute resolution is non-existent, the state's interest is fictitious, and the burden on the defendant is unusually large, the courts below were correct in dismissing this suit on due process grounds.

The First Amendment likewise requires that a state have a legitimate interest sufficient to outweigh the burden to the defendant. The state of New Hampshire has no legitimate interest in a non-resident publisher's communications about a non-resident plaintiff to non-resident readers. Such is the very great bulk, indeed the entirety, of this lawsuit.

Even if there were a minimal local reputation, compelling the defendant to litigate the entire controversy in an inconvenient forum is an overly broad remedial measure. The right to circulate literature would be chilled if, by selling to independent distributors that resold some portion of those magazines in New Hampshire, publishers would be subjecting themselves to

New Hampshire personal jurisdiction and to application of New Hampshire law to all activities engaged in and all injuries suffered in any state of the union.

Imposing such subjection to forum shopping as the price of minimal sales of magazines within the state violates the Commerce Clause as well as the First Amendment. A state may not burden defendant's engaging in interstate commerce by compelling it to respond to allegations of injury not related to New Hampshire in any way. Suits concerning out-of-state conduct affecting out-of-state plaintiffs cannot be predicated upon miniscule sales of the defendant's products within the state.

Finally, jurisdiction over the parent corporation L.F.P., Inc. and over Flynt, an employee holding the corporate title "publisher," is even less defensible than jurisdiction over Hustler. The plaintiff has failed even to allege L.F.P.'s specific participation in the publishing of the material at issue, and the mere parent/subsidiary relationship is insufficient basis for jurisdiction. Given the uncontroverted affidavits (36a) establishing its status as a mere holding company, L.F.P. has no constitutionally cognizable contacts, not even minimal local sales. As an employee of defendant Hustler, who likewise has not been shown to have contacts with New Hampshire, Flynt is not subject to jurisdiction in his personal capacity.

I.

Except where suit is brought in the defendant's home state, Due Process requires the plaintiff in a multi-state defamation action to demonstrate a substantial local reputation that constitutes a significant focus of the litigation.

This Court has recently re-emphasized the need for a sufficient nexus between the contacts upon which personal jurisdiction is predicated and the operative facts of the dispute sought to be adjudicated.[2] *Shaffer v. Heitner*, 433 U.S. 186 (1977) (jurisdiction cannot be based on mere presence of property not related to the dispute). In *Shaffer*, 433 U.S. at 212, this Court declared that all assertions of jurisdiction must meet the "minimum contacts" test set out in *International Shoe v. Washington*, 326 U.S. 310 (1945). The minimum contacts analysis of *International Shoe* is one of reasonableness and of "fair play and substantial justice". *Id.* at 316. The dual function of these limitations is protection of individual defendants and of values of interstate federalism. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). Concepts of this sort are not susceptible to quantification or mechanical application, and this Court has rejected two simplistic approaches.

First, it has explicitly denied that the mere fact that one of the defendant's products finds its way into the forum is itself sufficient to support jurisdiction, even where it is undisputed that the tortious injury was suffered entirely in the forum. *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). Under this approach, "[e]very seller of chattels would in effect ap-

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[2] In certain limited circumstances, a defendant may be amenable to "general jurisdiction" even over litigation having no nexus with its local activities because the state is its domicile, place of incorporation, or principal place of business. *See, e.g., Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952); *Milliken v. Meyer*, 311 U.S. 457 (1940); *See also* Von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966).

point the chattel his agent for service of process," a consequence this Court found unacceptable. *Id.* at 296.

Second, the Court has refused to allow assertion of jurisdiction based upon self-serving allegations about presence of intangibles, such as the hypothetical reputational interest asserted to be present in New Hampshire in the present case. *Rush v. Savchuk*, 444 U.S. 320 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (presence of stock). This scepticism is appropriate, for such allegations are easy to manufacture and hard to refute. In *Rush*, the Court rejected jurisdiction based upon the "presence" of the insurance company's "obligation to defend" in automobile accident litigation because that contact, if "present," would also be "present" in the other forty nine states. "It is apparent," concluded the Court, "that such a 'contact' can have no jurisdictional significance." 444 U.S. at 330.

The same can be said of the New Hampshire injury alleged here. In fact, Keeton's persistent claims that "the tort occurred in New Hampshire" (Pet. Brief 4, 7, 10, 11) show precisely how manipulable the location of intangible injury can be if the plaintiff need offer no plausible factual support. If the tort occurred in New Hampshire, it occurred in forty nine other states to at least as great a degree.[3] Such fictions serve only one function: they are pretexts introduced solely in an attempt to create constitutionally sufficient contacts. As the *Shaffer* Court noted in explaining why the presence of unrelated property was an inadequate basis for jurisdiction, "the only role played by the property is to provide the basis for bringing the defendant into court." 433 U.S. at 209. The trial court rejected Keeton's argument as a matter of fact, and this Court should not allow its reintroduction as a fiction.

Rejecting these two simplistic approaches, this Court has instead adopted a more sophisticated assessment of competing

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[3] For the same reason, New Hampshire may not establish local injury to circumvent jurisdictional limitations by "presuming damages" in New Hampshire.

factors. Keeton argues that the only relevant consideration is the defendant's contact with the forum. (Pet. Brief 5) But *World Wide Volkswagen* listed additional factors to be used in assessing the significance of these contacts:

> the burden on the defendant, while always a primary concern, will in appropriate cases be considered in light of . . . the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantive social policies.

444 U.S. at 292 [citations omitted]. Not a single one of these factors points towards New Hampshire adjudication of this case. The burden on the defendant is unusually large; the legitimate interests of the forum and the plaintiff unusually slight; and the interests of other states and of the interstate judicial system compellingly in favor of dismissal.

A. The burden on the defendant would be unusually large because New Hampshire is an inconvenient forum and the plaintiff seeks application of New Hampshire law to injury concededly not suffered in New Hampshire.

Even if the damage to New Hampshire reputation that petitioner alleges in order to obtain jurisdiction were plausible, it would constitute only a minute fraction of the dispute. In any realistic sense, Keeton's reputation is in New York where she resides and works. Her "personal humiliation, and mental anguish and suffering," *Gertz v. Welch*, 418 U.S. 323, 350 (1974), are indisputably not located in New Hampshire; if included they diminish the percentage of harm in New Hampshire even further. Keeton alleges damages in excess of forty million dollars; surely even she does not contend that any sizable portion of that figure is attributable to New Hampshire, where her "reputation" consists of having her name in the fine print of several

magazines, along with all the other officers on the masthead. And even if her reputation were evenly distributed across the country, instead of being centered in New York, over ninety nine percent of Hustler's circulation occurred in other states. (43a) The defendants' burden of producing witnesses and introducing evidence refuting allegations of harm is therefore far greater here than in cases such as *World Wide Volkswagen*, in which all of the harm concededly occurred in the forum and the physical evidence concerning the collision was located there. All witnesses in the present case are in New York, California, or Ohio. (45a) One of the defendants, furthermore, is confined to a wheelchair in Los Angeles. (45a)

Related to the extreme inconvenience of New Hampshire as a place to try the case is the extreme unfairness of adjudicating the case under New Hampshire procedural law. Petitioner seeks a New Hampshire forum precisely because she expects application of the New Hampshire statute of limitations as a procedural or remedial matter. Since the law of the forum governs on matters of procedure, *Restatement (Second) of Conflict of Laws*, §150 (1971), local procedural law is a burden that automatically follows the assertion of jurisdiction. Where there is a nexus between the litigation and the forum this is arguably not unfair. Plaintiff's goal in bringing this lawsuit in New Hampshire, however, is not to prove and recover New Hampshire damages. The trial judge has already found as a matter of fact that no New Hampshire reputation exists. Her goal is, rather, application of the New Hampshire statute of limitations to injury suffered in states where the statute of limitations has run. This extreme burden of defending injury totally unrelated to New Hampshire under New Hampshire procedures of adjudication is sufficient reason in and of itself to find this suit barred by the Due Process Clause.

New Hampshire procedural law is a burden that must be considered at this stage because the forum automatically applies its own rules of adjudication; but application of New Hampshire substantive law is an additional burden to be considered. The anticipated application of unfair substantive law is a legiti-

mate concern in assessing the burden to the defendant. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 311 n.19 (1980) (Brennan, J., dissenting). The plaintiff claims that "choice of law principles will uniformly select the appropriate substantive law to be applied, regardless of the situs of the litigation." Pet. Brief at 14. This flies in the face of the request, in her complaint, that New Hampshire damages law be applied. (6a, 13a) Moreover, New Hampshire follows the "better law" approach to choice of law, *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966), Kay, *Theory into Practice: Choice of Law in the Courts*, 34 Mercer Law Review 521, 564 (1983). This Court has explicitly declined to adopt the "better law approach" as a sufficient basis for jurisdiction, *Allstate Insurance v. Hague*, 449 U.S. 302 (1981) (plurality opinion). Indeed, one member of this Court has characterized one of the method's applications as "plainly unsound as a matter of normal conflicts law." *Id.* at 323 (Stevens, J., concurring). State rules in defamation cases vary considerably, and it cannot be assumed that application of the "better law" approach will lead to a fair result, or indeed to any result other than local law.[4] New Hampshire would have a better claim to apply its law to any portion of the injury realistically suffered in New Hampshire. Yet the burden that the plaintiff seeks to impose is application of New Hampshire law to damage claims from other states. Due process prohibits this result because the burden is excessive and because New Hampshire has no conceivable interest in the damage that constitutes the focus of the dispute.

B. New Hampshire has no interest in this litigation.

Due process requires assessment of the forum state's interest in the litigation. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). The district court rejected the claims of New Hampshire injury as a factual matter after allowing adequate

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[4] For example, application of local law led one state court to rule, in an "all purpose" public figure case, that the "actual malice" and "no liability without fault" standards do not require that the pub-

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opportunity for discovery, and held that the forum had no interest in the dispute. "Being listed in this litany of unknowns [on the masthead of magazines distributed in New Hampshire] does not make her name a household word here, *nor does it create a reputation or image of any kind in New Hampshire.*" (Pet. 7a (emphasis added)). It hardly seems likely that the plaintiff will adduce new evidence of New Hampshire injury at trial, nor does it seem likely that she will even attempt to, once the jurisdictional threshold is passed. Moreover, she has had ample opportunity already to allege a plausible set of facts to support her bald assertions of New Hampshire injury, and has failed through discovery or amending her pleadings to do so. It is not for an appellate court to disturb the trial judge's findings, absent some clear showing of abuse.

Even if the district court had not explicitly found as a matter of fact that there was no New Hampshire injury, unsupported and conclusory allegations of local harm should not suffice for jurisdiction. Contacts with the forum must be bona fide and not manufactured solely for the purpose of creating jurisdiction. In *Allstate v. Hague*, 449 U.S. 302 (1981) analogously, the plaintiff's residence was counted in favor of legislative jurisdiction only after it was determined that her change in residence was not motivated by forum shopping. 449 U.S. at 319.[5] More generally, this Court has insisted that jurisdiction

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lisher have any involvement with the particular publication but instead allow imposition of strict liability. *Guccione v. Hustler*, 7 Med. L. Rptr. 2077 (Ohio Ct. App. 1981).

The same court placed upon the defendant raising the defense of "satire" the burden of proving that it must have been manifestly clear that it could in no respect be regarded as an attack upon plaintiff's reputation.

[5] Counsel of record for Hustler magazine has argued at length in the academic literature that facts alleged for purely jurisdictional purposes are pretextual devices to circumvent the appropriate jurisdictional restrictions. Brilmayer, *How Contacts Count*, 1981 Sup. Ct. Rev. 77 (due process limits on in personam jurisdiction discount

not be predicated upon harm that is speculative, attenuated, hypothetical, or remote. *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42 (1976). Otherwise a plaintiff might easily circumvent all jurisdictional restriction through self-serving declarations of hypothetical injury. These would be conveniently forgotten at trial when the time for concrete proof arrived. The sole reason for alleging them, the need to establish adjudicative jurisdiction, would have been fulfilled.

The clearest cases of forum interest are those involving local plaintiffs. *E.g., McGee v. International Life Insurance*, 355 U.S. 220, 223 (1957); *McNamee v. APS Insurance Agency, Inc.*, 110 Wis. 2d 72 (1983), *appeal dismissed for want of a substantial federal question*, 51 U.S. L.W. 3857 (5/31/83). *Cf. Crider v. Zurich Ins. Co.*, 380 U.S. 39, 42 (1965) (state interest in providing forum for residents overrides other state's localizing statute). There are several reasons for this. First, it is arguable that states rightly care more about providing a forum for locals. *Olberding v. Ill. Central R. Co.*, 346 U.S. 338, 341 (1953) (residents are primary intended beneficiaries of non-resident motorist statutes). See also R. Cramton, D. Currie, H. Kay *Conflict of Laws*, 524 (3d ed. 1981) (forum non conveniens not usually applied to suits brought by residents).

Second, the forum's interest is most persuasive where a "stay at home" plaintiff has been injured by a defendant whose activities have crossed state lines. *National Equipment Rental v. Szukhent*, 375 U.S. 311, 327 (1964) (Black, J., dissenting) (state

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contacts alleged solely to establish jurisdiction); Brilmayer, *Legitimate Interests in Multistate Problems*, 79 Mich. L. Rev. 1315 (1981) (same for choice of law and judgments); Brilmayer, *The Jurisprudence of Article III*, 93 Harv. L. Rev. 297, 299 (1979) (plaintiff cannot circumvent "personal injury" test by hypothesizing possible future harm; injury must be realistic). The present case offers a clear example of an imaginative plaintiff alleging facts solely to circumvent jurisdictional limits. Thus, counsel respectfully submits, this analogy warrants consideration.

interest in protection of rights of citizens who never left state). Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 Ill. Law Forum 533, 556-569. Plaintiffs that never left their home state should not have to travel to assert their claims in a forum with which they have no connection, for the same reason that defendants should not have to travel to a state with which *they* have no contact. Third, in some cases, noting that the plaintiff is a local resident may simply be a short-hand way of saying that substantial injury was suffered in the state, so that an element of the cause of action transpired there. States have interests in controversies when the operative events occurred there. This assessment of "state interests" does not necessarily involve differential treatment of residents and non-residents. In appropriate cases where a non-resident suffers tangible injury in the forum that is the focus of the dispute, an interest may exist. *See, e.g., World Wide Volkswagen*, 444 U.S. 286, 294 (1980) (accepting arguendo that interest may exist in a case where the plaintiff is a non-resident injured in the forum).

None of these reasons violate the primary focus on the defendant's contacts and burdens. In fact, that focus could hardly be inconsistent with assessment of the forum's interests, given that this Court listed both defendant's burdens and state interests *in the same paragraph* in *World Wide Volkswagen*. It is merely that where the defendant has no contact with the forum, plaintiff's contacts and state interests cannot be relied upon as substitutes. This was made clear in *Rush v. Savchuk*, 444 U.S. 320 (1980):

> [The shift in focus from the defendant's to the plaintiff's contacts] is forbidden by *International Shoe* and its progeny. *If a defendant has certain judicially cognizable ties with the State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice.'*

> . . . Here, however, the defendant has *no* contacts with the forum.

444 U.S. at 332 [emphasis added]. The state interest test was used by the courts below as one consideration in evaluation of the contacts alleged to exist, and not as an attempted substitute. The purpose of the "interest" requirement is simply to ensure that there be adequate justification when a state attempts to impose substantial burdens on out-of-state defendants.

If the court below was incorrect in inquiring into the interests of New Hampshire, then it was likewise incorrect in its assumption that jurisdiction would be permissible as based upon sufficient state interest if the plaintiff were a resident. If "state interests" are irrelevant as Keeton claims, then even resident plaintiffs lack claims sufficient to outweigh defendants' burdens in situations like the present case. The plaintiff's argument appears to be that the state would have an interest sufficient to support jurisdiction where the plaintiff was a resident, and that it is obliged to extend this interest to every case involving a nonresident as well. Pet. Brief at 7-9. This sort of bootstrapping would create due process jurisdiction in all cases that might be filed in New Hampshire.

If this Court were to reverse its line of precedent examining the state's interest in providing a forum, then it would thereby declare irrelevant all allegations of local injury. This would be undesirable because cases involving plausible reputational injury in the forum would suffer as a consequence. The result would be that no plaintiff would then gain advantage by virtue of affiliation with the forum. In *Rush v. Savchuk*, 444 U.S. 320 (1980), for example, this Court's decision that the state interest in supplying a forum was not dispositive meant that jurisdiction was denied in all cases across the board, including those brought by locals. This would not help Keeton, who still would not have satisfied the minimum contacts test. But it is the proper resolution if the Court determines that state interests cannot figure in the due process calculation.

C. The interests of the interstate system and the shared interests of the several states require dismissal.

Petitioner argues that "state lines have been obliterated by modern technology." Pet. Brief at 14. This Court's opinion in *World Wide Volkswagen* holds the opposite:

> [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.

444 U.S. at 293. The greater ease of defending foreign lawsuits afforded by modern technology is undeniable; yet it does not lead to the conclusion that due process limitations should be abandoned. Indeed, modern technology is equally advantageous to either party; it makes litigation in a distant forum feasible for plaintiffs and defendants alike. State sovereignty, however, involves more than convenience of litigation. *Id.* at 294.

One aspect of state sovereignty that the *World Wide Volkswagen* Court held to have been protected by the Framers was the sovereign power to try causes in their own courts. *Id.* at 293. This prerogative impels limitations on the power of a single state to try all of the cases that might be filed there. Prior to the advent of interstate recognition of judgments, this sovereign prerogative would be protected by the fact that enforcement exigencies would usually dictate filing in a state having a nexus with the dispute. Once judgments were guaranteed full faith and credit, however, the only method for ensuring a rational nexus between the forum and the litigation was due process limits on state court jurisdiction, since only jurisdictionally defective judgments would be subject to collateral attack. The sovereign prerogative of trying local cases in the sovereign's own courts was honored by limiting the power of other states to try cases having no local contacts. These limits function as the quid pro quo for full faith and credit.

No rational allocation of judicial business would assign this case to New Hampshire. The defendants have properly raised

venue objections in addition to their objections to personal jurisdiction. (34a) For purposes of determining venue, the plaintiff's self-serving allegations about where the cause of action arose are irrelevant, as they should be for purposes of determining personal jurisdiction. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 185 (1979). The plaintiff cannot be given such control over where the lawsuit is tried, because such fictitious allegations of local injury allow a choice amongst fifty states to bring suit and facilitate complete circumvention of the policies underlying venue restrictions.

New York and Ohio are the two reasonable choices of forum. Jurisdiction, clearly, was available in Ohio. New York excepts defamation actions from its *in personam* jurisdiction statute regarding "tortious acts", New York Civil Practice Law §302(a)(2)(3). (Pet. 22a). However, New York courts have exercised jurisdiction over out-of-state defamation defendants when they qualified under other provisions of the code. *See, e.g., GTP Leisure Products, Inc. v. B-W Footwear Co., Inc.*, 55 A.D. 2d 1009, 391 N.Y.S. 2d 489 (4th Dept. 1977) (jurisdiction permissible in defamation action where defendant "transacted business" in New York). Other sections of the New York civil practice law, furthermore, expansively preserve all opportunities for jurisdiction previously available under New York common law.[6] The most likely explanation for Keeton's disinclination to file suit in her home state is, therefore, the fact that she had allowed the statutory time period to elapse.

Keeton has filed this action in New Hampshire solely to evade her home state's law, which Ohio properly respected. Her remedy if she dislikes either the long arm statute or the statute of limitations of New York is to influence her legislature to have

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[6] New York C.P.L.R. §301. New York has, moreover, taken a very expansive view of general jurisdiction under this provision. *See, e.g., Bryant v. Finnish National Airline*, 15 N.Y. 2d 426, 260 N.Y.S. 2d 625, 208 N.E. 2d 439 (1965). The fact that Hustler magazine has qualified to do business there would thus make jurisdiction proper.

it changed. Other states have no legitimate interest in enabling her to circumvent it. For New Hampshire courts to assert jurisdiction over this case and to try it in accordance with New Hampshire law would be a violation of its obligation to respect the co-equal sovereignty of its sister states.

From the perspective of the interstate judicial system, it is entirely sensible to allocate judicial business according to the parties' residence. Several federal statutes pursue exactly this course. For instance, the federal venue statute, 28 U.S.C. §1391, turns on (among other things) the residence of the plaintiff and the defendant. Nonresident plaintiffs are thus "discriminated against." Removal jurisdiction employs residency classifications as well. 28 U.S.C. §1441.

This Court, moreover, has consistently upheld state statutes refusing adjudication to claims held by non-residents where the events comprising the dispute had little or no connection with the state. *Anglo-American Provision Co. v. Davis*, 191 U.S. 373 (1903) (upholding state statute denying jurisdiction over suits by foreign corporations against foreign corporations on foreign judgments); *Chambers v. Baltimore Ohio R.R.*, 207 U.S. 142 (1907) (upholding door closing statute denying jurisdiction over actions for wrongful death occurring out of state except where the deceased was a citizen); *Douglas v. New Haven Railroad*, 279 U.S. 377 (1929) (similar statute upheld as based upon "rational considerations," 279 U.S. at 387). This Court has also explicitly approved the common law door closing doctrine of forum non conveniens, *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), even though forum non conveniens is rarely used where the plaintiff is a forum resident, R. Cramton, D. Currie, H. Kay, *Conflict of Laws* 524 (3d ed. 1981). *See also Missouri ex rel Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950) (upholding forum non conveniens dismissal of suit brought by non-resident). In interpreting the proper scope of the doctrine, the Court has been influenced by the fact that its usefulness would be destroyed if the substantive law the plaintiff chose was invariably

protected. *Piper Aircraft v. Reyno*, 454 U.S. 235, 249 (1981). *See also Gulf Oil, supra*, at 508-512 (dismissal appropriate even where inconvenient forum chosen in expectation of more generous jury verdict).

The shared state interest underlying residence-based allocation of access to adjudication is the prevention of forum shopping and the resulting interference with the prerogatives of other states. Thus, in upholding a state durational residency requirement for divorce, this Court approved measures that limited evasion of home-state divorce law by restricting adjudication:

> Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here.
>
> Such a requirement additionally furthers the State's . . . interest in . . . avoiding officious intermeddling in matters in which another State has a paramount interest . . . A state such as Iowa may quite reasonably decide that it does not wish to become a divorce mill . . .

Sosna v. Iowa, 419 U.S. 393, 407 (1975). *See also Martinez v. Bynum*, 51 U.S. L.W. 4524 (5/2/83) (upholding denial of free schooling when non-resident minor present primarily for purpose of attending public free schools). Due process in fact *requires* that jurisdiction be predicated upon domicile of one of the parties in divorce cases, *Williams v. North Carolina II*, 325 U.S. 226 (1945); *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954), or similar substantial connection not amounting to technical domicile. *See, e.g., Lauterbach v. Lauterbach*, 392 P.2d 24 (Ala. 1964) (serviceman stationed in state). Moreover, there is no discrimination problem where plaintiffs are merely required to sue in the forum most convenient to them.

D. Plaintiff's interests in obtaining convenient relief are not served by New Hampshire suit.

The courts below were appropriately sensitive to the final element in the *World Wide Volkswagen* calculus: the plaintiff's interest in obtaining convenient relief. New Hampshire is a "convenient" forum only in the sense that it is convenient for the plaintiff to be able to choose amongst fifty statutes of limitations. A rule that requires substantial injury in the forum protects all legitimate claims to convenient relief. For purposes of the convenience of the plaintiff and her witnesses, no forum would be more convenient than New York and few less convenient than New Hampshire. Obviously New Hampshire was not chosen for purposes of convenience at trial; in fact New Hampshire was chosen only after the action was already once dismissed in Ohio. But the plaintiff acquired no vested rights in the six year statute of limitations simply because research uncovered a state that had enacted one. *Piper Aircraft v. Reyno*, 452 U.S. 235, 247 (1981) (forum non conveniens dismissal not barred by likely resulting change in law).

The plaintiff's interest in obtaining convenient relief is strongest when the plaintiff has never left his or her home state and seeks to sue there. If the defendant has injected himself into the plaintiff's home state, then he has at least that relationship with that forum. But the stay-at-home plaintiff, conversely, may have no contact with the home state of the defendant. One party or the other must choose between litigating in an inconvenient forum and forgoing all opportunity to present his or her claims on the merits. This Court has shown concern for local plaintiffs faced with the prospect of travelling to a forum with which they have no contact; *McGee v. International Life Insurance*, 355 U.S. 220, 223 (1957). *Cf. Kulko v. Superior Court*, 436 U.S. 84, 100 (1978) (denying jurisdiction and discussing statutory scheme whereby plaintiff could obtain relief without leaving her home state). *See also Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 325 (10th Cir. 1977), *cert. denied sub nom. Times Mirror Co. v. Anselmi*, 432 U.S. 911 (1977). If the defendant has initiated the

interstate contact tha. injures a stay-at-home plaintiff, it is fairer that he be the one to choose between default and inconvenient litigation than that this choice be forced upon the injured plaintiff. This rationale has no application where the plaintiff engages in blatant forum shopping for the most favorable law. While the Due Process Clause respects the plaintiff's interest in finding a forum, it does not guarantee a generous one, nor one with a long statute of limitations.

If the Due Process Clause continues to be interpreted to require a balancing of the defendant's burden, the forum interests, the interests of other states and of the multistate judicial system, and the plaintiff's interest in obtaining convenient relief, then the courts below were correct in dismissing the case. Even if the plaintiff were correct in her unsupported speculations of New Hampshire harm, which the district court rejected, New Hampshire's interest would be inadequate to justify a burden to the defendant of this sort, since the burden includes litigation of an enormous claim of injury totally unrelated to New Hampshire. This added burden of defending against claims of injury unrelated to New Hampshire is not coincidental; Keeton deliberately engineered this result. To allow jurisdiction here would violate this Court's admonition that there must be a nexus between the forum, the parties, and the litigation. It would, further, allow defamation plaintiffs to create jurisdiction out of whole cloth wherever they chose, thus flouting the orderly administration of justice.

II.

The First Amendment does not permit a State to penalize a publisher for the simple fact of minimal local sales by requiring the publisher to defend against claims of injury bearing no bona fide relationship to those sales.

The First Amendment is applicable to assertions of long arm jurisdiction as it is to every other exercise of state power. Were it otherwise, a state could penalize expression of unpopular views that were constitutionally protected simply by choosing

subjection to long arm jurisdiction as a sanction. Moreover, the First Amendment requires that a state have a substantial interest and that the methods chosen be narrowly tailored to meet that interest. Finally, a less restrictive and therefore preferable alternative would be for the plaintiff to bring suit in either the defendant's home state or the state where the principal portion of the injury was suffered.

A. *Applicability*

The First Amendment is applicable to assertions of long arm jurisdiction simply because there is no reason to exempt that sort of state action from constitutional standards that all other state action must meet. Long arm statutes enjoy no "preferred position". If New Hampshire had more expansive rules for asserting jurisdiction over newspapers advocating socialism than over those that did not, this Court would presumably not hesitate to invalidate those rules as impinging on free speech. The fact that a socialist newspaper owner might prevail on the merits of all litigation brought pursuant to this statute would surely be irrelevant. Similarly, First Amendment scrutiny would be appropriate if the state enacted a more expansive long arm statute where the defendent was a publisher than where he was a manufacturer, just as scrutiny is appropriate where the state taxes printer's ink more heavily than other goods. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* 51 U.S. L.W. 4315 (3/29/83). Singling out publishers for more onerous treatment than other defendants implicates First Amendment values directly.

Even neutral procedural rules may be subject to First Amendment scrutiny when applied in free speech cases. *See generally* Monaghan, *First Amendment Due Process,* 83 Harv. L. Rev. 518 (1970); Note, *Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis,* 9 Hast. Con. L. Q. 975, 989 (1982). For example, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975) and *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247 n.6 (1974), this Court in-

terpreted leniently the usual appellate requirement that there be a final judgment in the state court below. Although deference to ordinary state court functioning is an important federalism concern counselling against piecemeal interlocutory review, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), in *Cohn* and *Tornillo* the potential chilling effect of the state court ruling made interlocutory review appropriate. Other neutral procedural rules that have accommodated First Amendment values include procedure for examination of the record on appeal, *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964); standard of proof, *New York Times v. Sullivan, supra, Speiser v. Randall*, 357 U.S. 513 (1958); and waiver, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The *Butts* plurality argued,

> the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other freedom'. . . . Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

388 U.S. at 145. Mr. Justice Harlan then approvingly cited *New York Times v. Connor*, 365 F.2d 567 (5th Cir. 1966) (long arm jurisdiction against defamation defendants should be restricted because circulation of publications will be chilled).

The rule at issue here, at any rate, is not evenhanded in the way that the final judgments requirement is. The principle of personal jurisdiction that the petitioner urges has a disproportionate impact on First Amendment defendants, and should therefore be examined as closely as this Court would examine a long arm statute that was explicitly more aggressive in asserting jurisdiction over publishers than other types of defendants.

The disproportionate impact on publishers arises from the peculiar nature of multistate defamation actions. In multistate defamation actions, injury to reputation will be both intangible

and arguably widespread. Because such injury is intangible, plaintiffs will always be able to speculate that some minimal local injury might have occurred. To grant jurisdiction in such situations, ironically, gives an unwarranted advantage to public figures, who can more plausibly speculate reasons that some local persons may know their names. This directly contradicts *New York Times v. Sullivan*, 376 U.S. 254 (1964), which reduces protection for those who choose to thrust themselves into the public eye. *See also Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157 (1979). *Cf. Hanson v. Denkla*, 357 U.S. 235 (1958) (unilateral activity of plaintiff cannot create jurisdiction).

Moreover, it would allow defamation plaintiffs to choose whatever forum they like even if they know that the allegations of local injury will be utterly unsupportable at trial. In contrast, the typical tort plaintiff would never be able to hypothesize harm in fifty jurisdictions at once. If a plaintiff in Keeton's position may sue in New Hampshire, then there is no limit to where publishers can be forced to defend. By thrusting themselves into the public eye—indeed, by merely *alleging* that they had done so—defamation plaintiffs could manufacture jurisdiction in a manner simply not available to plaintiffs in other sorts of tort suits.

While the First Amendment does apply to assertions of long arm jurisdiction, it is not because of any "preferred position" that free speech rights might be thought to deserve. The applicability is a simple consequence of the fact that there is no reason to exempt long arm jurisdiction from constitutional scrutiny generally, and no reason to treat the First Amendment as a less potent limitation than any other restriction on state action. Other social policies also figure into the personal jurisdiction calculus. Note, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. Chi. L. Rev. 156, 174 (1982); Carrington and Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 Mich. L. Rev. 227, 230 (1967).

More specifically, there are other constitutional provisions that directly limit the state's very right to hale a defendant into court. The Speech and Debate Clause is one, *Helstoski v. Meanor*, 442 U.S. 500 (1979). Double Jeopardy is another, *Abney v. United States*, 431 U.S. 651 (1977).

> In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him . . . Rather, he is contesting *the very authority of the government to hale him into court to face the charge against him.*

Abney v. United States, 431 U.S. 651, 659 (1977), cited in *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979) (emphasis added by the *Helstoski* court). *See also Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (Speech or Debate Clause protects Congressmen from burden of having to defend). The free and robust debate that the clause was designed to encourage would be effectively discouraged by process costs even if the defendant expected ultimately to prevail. The government would have an effective sanction for deterring protected speech if there were no limits on its ability to hale the defendant into court.

What sets the First Amendment apart is only the extent to which the problem of process costs has been explicitly recognized. For example, whether or not a federal court may issue injunctions against pending state criminal proceedings in First Amendment cases depends upon whether process costs are being used as sanctions in and of themselves, and upon the reasonableness of relegating the defendant to raising his claim as a criminal defense. Where a criminal prosecution is already pending and there is no showing of bad faith, raising a substantive defense to criminal charges is as expeditious a method as any other, so that the process costs are neither greater than necessary nor utilized as sanctions. *See, e.g., Younger v. Harris*, 401 U.S. 37, 46 (1971) (threat must be one that cannot be eliminated by a successful defense). In contrast, the complainant will not be rel-

egated to his defenses on the merits where he raises constitutional objections to the very fairness of adjudication in a particular tribunal itself. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

Keeton should not be free to use subjection to inconvenient litigation as a form of retaliation. In *New York Times v. Sullivan* this Court recognized the chilling effect of the prospect of defamation litigation. 376 U.S. 254, 279 (1964). *See also Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality opinion). Keeton instituted two suits in New Hampshire after dismissal of her Ohio claim, one in federal court and one in state court after the first was dismissed, thus multiplying the burden of the defendant's litigation. All were based upon the same operative facts. The costs which Keeton has imposed upon the exercise of the right to publish could only be warranted by a compelling state interest.

B. *Legitimate Interests*

Petitioners seem to concede that New Hampshire's sole concern in entertaining the dispute is to penalize Hustler for the fact that its magazines were distributed there, regardless of the extent or existence of any local damage. Pet. Brief at 8. They further argue that Hustler might protect itself in the future by preventing distribution of its magazines within the state. *Id.* at 13. The *World Wide Volkswagen* language upon which they rely was not, however, designed to authorize states to violate the Bill of Rights by discouraging the exercise of constitutionally protected freedoms. Moreover, petitioners can hardly argue that assertion of jurisdiction would not constitute a chill when by their own admission the purpose and effect of the rule might be to cause magazine publishers to withdraw from the market.

The First Amendment requires that a state have a legitimate, indeed a compelling, interest at stake before it predicates sanctions upon writing, publishing, or speech. *Board of Education v. Barnette*, 319 U.S. 624, 639 (1943). Circulation is protected along with writing and publishing. "[I]ndeed, without the circulation, the publication would be of little value." *Ex*

Parte Jackson, 96 U.S. 727, 733 (1877); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). This Court has said that "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1973). New Hampshire is not entitled to penalize a publisher simply because it believes that the publisher's magazines cause injury in other states; it should assert its *own* state interests. Nor can New Hampshire decide that, because it disapproves the contents, certain magazines that cause no tortious injury within the state should nevertheless not be allowed to circulate there. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 292 (1964) (Supreme Court can determine for itself that no harm was done to plaintiff because falsehoods not "of and concerning" plaintiff; defamation suit must then be dismissed). *See also Rosenblatt v. Baer*, 383 U.S. 75 (1966). Neither should it be allowed to achieve these goals by using fictitious local injury as a pretext for jurisdiction and imposition of the burden of mounting an expensive defense as a sanction. The burden of defending must instead be justified by bona fide interest in reparations for local injury realistically suffered. Such interests are quite adequately served by less restrictive alternatives.

C. *Less Restrictive Alternatives*

When First Amendment rights are at stake, a state must use methods narrowly tailored to meet its legitimate goals. As held by *Gertz v. Welch*, 418 U.S. 323, 349 (1973), "[i]t is . . . appropriate to require that state remedies for defamatory falsehood reach no farther than necessary to protect the legitimate interest [of reparations] involved." One alternative that at first blush appears less restrictive would be to limit jurisdiction to damage suffered locally. When a state asserts long arm jurisdiction over a cause of action involving injury within the state, the defendant has a choice amongst three alternatives; to defend on the merits, to settle, or to default. If defense on the merits is highly inconvenient, the latter two options are still available. Each option protects the state interest in reparations. The defendant's fourth

choice is not to deal with independent distributors that send some of their stock of magazines into the state.

When a defendant chooses to do business in a state where the expense of defending is expected to be prohibitively high, the reason presumably is that he considers his likely profit sufficient to outweigh settlement or default of claims not worth adjudicating. He need not be concerned about the high expense of distant adjudication if the profits of the local market eclipse the liabilities it generates. Thus, he need not be forced to withdraw from local markets if his profits enable him to compensate local injury. There is some chilling effect, but the only publishers that are chilled are those whose expected local profits are less than the tortious harm they expect to impose, discounted by the improbability of their occurrence. The state's legitimate interests are adequately accommodated when only these publishers withdraw, and those that remain give reparations, through adjudication or settlement, for local tortious injury.

The option of paying reparations for local injury through settlement or default is simply unavailable if the state can assert jurisdiction over injury with which it has no connection. The stakes in the lawsuit are multiplied. Where the costs of litigation are expected to be high, removing the settlement and default options dramatically increases the pressure to withdraw: the "chilling effect". Yet the state has no interest in forcing from its market publishers willing to reimburse all of the costs the state is actually entitled to impose, namely the costs arising from local business. The imposition of "general jurisdiction" over injury unrelated to the state is more restrictive than necessary to accommodate legitimate interests because it forces such publishers from the market.

Restricting suit to local injury is unacceptable, however, because it means either a series of suits or forcing the plaintiff to elect a single state, with injury there providing the measure of damages. The latter alternative is unfair to plaintiffs; the former is unfair to plaintiffs and defendants alike. Requiring a series of suits is also insufficiently sensitive to the state's interests in

providing a convenient forum for adjudication and in conserving judicial resources. An alternative more advantageous to all concerned is to consolidate litigation in a single forum, either the defendant's home state, where process costs are lowest, or the state *in which the overbreadth is at a minimum*. This will be the principal place of the plaintiff's reputation, usually his or her state of residence. The plaintiff's interests are adequately served by allowing a choice between the plaintiff's and defendant's home state. So are the state's, since states need not impose higher costs than requiring adjudication of local injury unless their goal is to deter local circulation *regardless* of the existence and extent of local injury. This goal, however, crosses the boundary separating legitimate purposes of defamation law from impermissible restrictions on the right to publish.

The single publication rule reflects the policies that make a single suit in the plaintiff's or defendant's home state appropriate. In order to protect the right to publish, the rule requires a plaintiff to consolidate all actions in a single action. This does not mean that the plaintiff may choose any forum whatsoever and bring her entire action there. The single publication rule cannot create jurisdiction where none exists. It simply prohibits successive suits even where jurisdiction is available in several different states. The alternative of a single suit in either the defendant's home state or the principal location of the injury is therefore most consistent with First Amendment values. Lower courts that have considered jurisdiction over First Amendment defendants have all acted consistently with this requirement.[7]

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[7] Courts that have granted jurisdiction have done so on behalf of resident plaintiffs, sometimes citing a need to protect stay-at-home plaintiffs from having to travel to present their claims. *See, e.g., Anselmi v. Denver Post*, 552 F.2d 316 (10th Cir. 1977) *cert. denied*, 432 U.S. 911 (1977). One court that discussed the issue at the instigation of non resident plaintiffs denied jurisdiction. *Curtis v. Birdsong*, 360 F.2d 344 (5th Cir. 1966). Another court failed to address the issue, which was apparently waived because not raised by the defendant in a timely fashion. *Galonis v. National Broadcasting Co.*, 498 F.Supp.

(footnote continued on following page)

Keeton herself has demonstrated how burdensome defending multiple litigation can be. Upon losing the first action in Ohio, she merely shifted ground to New Hampshire and filed two additional actions there. Her activities definitely evince an attempt to harass the defendants, and to retaliate against them by subjecting them to the onerous burdens of litigation in a variety of fora, some distant from the defendants' base of operation and willing to impose unreasonable "procedural" rules such as a six year statute of limitations. The burden of defending a defamation action is substantial. Anderson, *Libel and Press Self Censorship*, 53 Tex. L. Rev. 422, 424, 435 (1975). And the burden of appearing in state after state, as long as the plaintiff can find one with a long statute of limitations, is simply too great to impose upon the exercise of the right to publish. It is entirely possible that a plaintiff might even find a state with a tolling provision in its statute of limitations, so that the cause of action would persist indefinitely. *Cf. Searle v. Cohn*, 455 U.S. 404 (1982) (upholding application of tolling provision to corporation that could have been reached by service of process). The First Amendment prohibits predicating such open ended liability upon fictitious allegations of minimal local reputation.

III.

The Commerce Clause prohibits predicating general jurisdiction over cases brought by nonresidents upon defendant's engaging in interstate commerce.

Even in situations where there are legitimate local interests, the Commerce Clause limits state regulatory jurisdiction that is overly broad and frustrates out-of-state activities that do not fall within the local interests. In *Edgar v. Mite*, 102 S.Ct. 2629 (1982),

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(footnote continued from preceding page)
789 (D.N.H. 1980). It has sometimes been suggested that First Amendment considerations limit jurisdiction somewhat even in suits brought by resident plaintiffs. See, e.g., *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966), although the opposite has also been declared. *Anselmi v. Denver Post, supra*, at 324.

this Court rejected a justification for a state business take-over law in the context of a Commerce Clause challenge. The law, which allowed the secretary of state to block a nationwide tender offer, was alleged to be supported by the Illinois interest in protecting resident shareholders. The Court wrote:

> While protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as Illinois burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.

102 S.Ct. at 2642. The act, in its entirety, was therefore struck down.

The Commerce Clause limits assertions of state adjudicative jurisdiction, also. *See, e.g., Davis v. Farmers Cooperative Co.*, 262 U.S. 312 (1923). For this reason, a consistent string of precedents has held foreign corporations engaged in interstate commerce not to be amenable to general jurisdiction over causes of action that did not center around the defendant's forum activities. *L.&N.R. Co. v. Chatters*, 279 U.S. 320 (1928); *Simon v. Southern Railway*, 236 U.S. 115 (1914); *Old Wayne Life Ass'n. v. McDonough*, 204 U.S. 8 (1906). In *Michigan Central v. Mix*, 278 U.S. 492 (1928) this Court ordered dismissed, on commerce clause grounds, a cause of action unrelated to the defendant's forum activities because the plaintiff was a non-resident at the time that the cause of action accrued, and her subsequent move to the forum might have been "solely for the purpose of bringing the suit." 278 U.S. at 495. *Mix* was later explained on the grounds that

> [T]here was no proof of such a relation between the residence or activities of the suitor and the forum chosen for the suit as to make the choice a natural or suitable one, and rid the burden on the carrier of at least a measure of the hardship.

International Milling v. Columbia Co., 292 U.S. 511, 518 (1933). In contrast, jurisdiction was appropriate in *International Mill-*

ing because the plaintiff was

> [i]n a very real and practical sense, . . . a resident of the forum. . . . Certainly its relation to the locality was so permanent and intimate as to relieve it of the opprobrium of an impertinent intruder when it went into the local courts.

292 U.S. at 519. While this Court declined to hold that the residence of the suitor would necessarily be sufficient in and of itself, it held that residence "is a fact of high significance." 292 U.S. at 520. Elaborating, the Court added that plaintiffs who were local creditors should not be expected to leave their state to sue the defendant elsewhere.

As these two lines of cases suggest, the state has a legitimate concern with out-of-state activities that cause harm within the state to locals, and an interest in providing a forum in such cases. Defendants might well be expected to pay the costs of their local activities as the price of local business. "Interstate commerce must pay its own way." *Postal Telegraph Cable Co. v. Richmond*, 249 U.S. 252, 259-260 (1919). But the burden of mounting an inconvenient defense cannot be justified by reference to harm alleged to have occurred outside the state. Neither should defendants be compelled to pay costs allegedly caused by these out-of-state activities as a precondition to entry into the local market. The state has no interest in imposing these costs, per se, and no right to use imposition of these costs to penalize exercise of the right to engage in interstate commerce. Adjudication is unjustifiable because it is supported by neither a compensatory nor a deterrent interest.

Furthermore, even where there is minimal local impact, as in *Mite*, insofar as the state imposes upon portions of the activity that have no relation to the state, there is nothing to be weighed in the balance to sustain the law. The court of appeals in the instant case phrased it well. Like the *International Milling* Court, it did not hold that the plaintiff's residence was the only consideration.

> Rather, considering this case on the individual facts . . . we decide here only that the New Hampshire tail is too small to wag so large an out-of-state dog.

Pet. 18a

IV.

Jurisdiction over Larry Flynt and L.F.P., Inc. is improper.

The plaintiff, Kathy Keeton, apparently treats all defendants in this case as interchangeable, since no arguments directly address the minimum contacts between Larry Flynt and New Hampshire or L.F.P., Inc. and New Hampshire.[8] Yet contacts must be assessed individually, and not indiscriminately lumped together. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (insurance company's contacts not attributable to named defendant). This is equally true with regard to corporations, their officers and employees, and other corporate entities with which they are affiliated. *See, e.g., Riverside and Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915) (service of process on corporate officer while present in jurisdiction does not establish jurisdiction over corporation).

Specifically, jurisdiction over a subsidiary will not, without more, establish jurisdiction over the parent corporation. *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85 (1933), *citing Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925); *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918). *See generally* Comment, *Jurisdiction over Parent Corporations*, 51 Calif. L. Rev. 574 (1963). This is true even where the parent corporation owns all of, or a controlling interest in, the stock of a subsidiary. *Peterson v. Chicago, R.I. & P.R. Co.*, 205 U.S. 364 (1907); *Conley v. Matheison Alkali Works*, 190 U.S. 406 (1903). Keeton has not alleged, much less demonstrated, that

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[8] She likewise apparently assumes that venue, if proper for one, is proper for all. Yet L.F.P., Inc. and Larry Flynt are implicated in no cause of action arising in New Hampshire sufficient for purposes of federal venue.

Hustler Magazine was acting as the agent of or at the instructions of L.F.P., Inc., with regard to these particular issues. The uncontroverted affidavits suggest the opposite. (37a)

Jurisdiction is likewise lacking over Larry Flynt personally, who has not been shown to have exerted control over the material in question. Numerous courts have held that employees who acted in their official capacity are shielded from suit in their private capacity. *Chem Lab Products v. Stepanek*, 554 F.2d 371 (9th Cir. 1977); *Grove Press, Inc. v. Central Intelligence Agency*, 483 F. Supp. 132 (S.D.N.Y. 1980). This rule has been applied even where the employee's activities occurred within the jurisdiction. *Bulova Watch Co. v. K. Hattori*, 508 F.Supp. 1322 (E.D.N.Y. 1981). *See also, Marine Midland Bank N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981).

The wisdom of this policy in defamation cases is evident, especially where suit is brought in a forum other than the plaintiff's residence. A writer may happen to know where the future plaintiff resides or possesses substantial reputation. Typically, though, it will be completely unpredictable where the plaintiff will choose to sue if given a choice of fifty states. To the extent that it is predictable, it will be because some states stand out as the most plaintiff oriented of all, by advantageous rules of law or choice of law rules. This sort of predictability is almost worse than none at all, because it maximizes the chilling effect of that law and also the extent of that state's interference with the local prerogatives of other sovereign actors in the federal system.

Furthermore, the chilling effect on employees is more serious because employees do not gain corresponding advantages when circulation is increased in the same way as the corporation that publishes the magazine. Since employee compensation is not affected, as corporate revenues are, by an increase in circulation, the willingness to work for a nationwide publication or to expand limited circulation to nationwide proportions is not reinforced against the countervailing consideration of increased subjection to suit. Litigation may, moreover, be initiated after the employment relationship is terminated and when no help in

meeting legal fees will be forthcoming. This is unfair because the individual defendant has not personally availed himself of any benefits flowing from the local market, but has acted only on behalf of the corporation. *Bulova Watch, supra,* at 1347-1348.

CONCLUSION

It is not coincidental that the Due Process Clause, the First Amendment, and the Commerce Clause all require that the state have a legitimate interest. Any assertion of sovereign power must be evaluated in terms of the legitimacy of what the State seeks to achieve. The governmental interest must be balanced against the burdens that its assertion imposes upon the objecting party. In the present case, the New Hampshire interest is miniscule even if the plaintiff's hypothesized harm can be taken at face value. The burden is not proportionate to this interest, as will often be true when defendants are sued in fora chosen for their statute of limitations and not for their connection with the dispute. This burden is applicable virtually only to First Amendment defendants, and predicated upon the right to publish and to engage in interstate commerce. Since there is no legitimate interest sufficient to support this disproportionate burden, the decision of the two courts below should be affirmed.

Respectfully submitted.

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